Supreme Court, U.S.
FILED
MAR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1147

In The

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA,

Petitioner,

vs.

CHESTER LEE BROOKS, A/K/A
ACHISSON AMENSHI AND
LARRY JOE BROOKS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES R. WINNIE, ESQ.*
1900 Dorchester Drive
Oklahoma City, OK 73120
Tel. (405) 842-5653

and

LESLIE R. REYNOLDS, ESQ.
112 South Choctaw
Bartlesville, OK 74003
Tel. (918) 336-3807

Attorneys for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18pp

QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction to prosecute two Native Americans for crimes alleged to have been committed in Indian Country as defined by 18 U. S. C. Section 1151 (c)?

TABLE OF CONTENTS

Page

STATEMENT 1

ARGUMENT 4

CONCLUSION 8

APPENDIX A .....App. 1

APPENDIX B.....App. 3

TABLE OF AUTHORITIES

Page

CASES

Antoine v. Washington, 420 U. S. 194 (1974) 5

Cheyenne-Arapaho Tribe of Oklahoma v. State of Oklahoma, 618 F. 2d 665 (10th Cir. 1980) 5

C. M. G. v. State, 594 P. 2d 798 (Okl. Cr. 1979) 5, 6

Indian Country USA, Inc., v. Oklahoma Tax Comm., 829 F. 2d 967 (10th Cir. 1987), Cert. den. *Oklahoma Tax Comm., v. Muscogee (Creek) Nation*, June 27, 1988, No. 87-1068 .....3, 5, 6, 7

Menominee Tribe v. United States, 391 U. S. 404 (1968) 5

Montana v. Blackfeet Tribe of Indians, 471 U. S. 759 (1985) 5

Muscogee (Creek) Nation v. Hodel, 851 F. 2d 1439 (D. C. Cir. 1988), Cert. den. *Hodel v. Muscogee* (Creek) Nation, Jan. 9, 1989, No. 88-798 2

Ex Parte Nowabbi, 61 P. 2d 1139 (Okl. Cr. 1936).. 4, 6, 7

State v. Burnett, 671 P. 2d 1165 (Okl. Cr. 1983).....5, 6

State v. Klindt, Oklahoma Court of Criminal Appeals No. S-84-781, pending on rehearing 2

State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, 711 P. 2d 77 (Okl. 1985) 6, 7

State v. Littlechief, 573 P. 2d 263 (Okl. Cr. 1978).....5, 6

United States v. Burnett, 777 F. 2d 593 (10th Cir. 1985) 5

Worcester v. Georgia, 31 U. S. 515 (1832) 5

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3 5

Article II, Section 2, Clause 2 5

Article VI, Clause 2 5

ACTS OF CONGRESS

Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 367 7

18 U. S. C. § 1151 (c) 4

25 U. S. C. §§1121 et. seq. (P. L. 83-280) 4, 5, 7

MISCELLANEOUS

Opinion of the Attorney-General of Oklahoma No. 87-176. 10 *Opinions of the Attorney-General* 464 6

Cohen, *Handbook of Federal Indian Law* (1982 Rev.) 6

No. 88-1147

In The

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA,

Petitioner,

vs.

CHESTER LEE BROOKS, A/K/A
ACHISSON AMENSHI AND
LARRY JOE BROOKS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATEMENT

Respondents oppose the Petition as there is no reasons for further review of this matter. The decision below is in accord with well established and settled law.

Respondents, with the exceptions noted herein, agree with the "Nature of the Controversy" (Petition, pp. 4-7) and "Proceedings Below" (Petition pp. 7-14) and those

portions of the Petition will serve as Respondents' Statement of the Case. The exceptions noted follow.

Petitioner believes this case to be parallel with *Muscogee (Creek) Nation v. Hodel,* 851 F. 2d 1439 (D. C. Cir. 1988), Cert Den. *Hodel v. Muscogee (Creek) Nation,* January 9, 1989 No. 88-798, and *State v. Klindt,* No. S-84-781, pending on rehearing before the Court below. *Hodel* now final is authority holding that the Muscogee (Creek) Nation has the power to establish Tribal Courts and Law Enforcement Agencies in recognition of the Nations jurisdiction and its own Indian Country. *Klindt* could well turn on the fact that neither the committing magistrate nor the District Court on Appeal made specific findings that he was of Native American or Indian blood. Petitioner agrees in footnote 3, page 5 of its Petition. Such a finding is, of course implicit, but the Court below may well use *Klindt* to specify how proof is to be made of Indian blood, and how the Courts below should make such findings, and what, if any further record is necessary for appeal. The cases all involve state criminal prosecutions in Indian Country, but otherwise are unrelated.

The *amicus* seems to suggest some relationship in these cases. The United States makes a broad statement in the "Interest" portion of its brief (p 1) of the supposed unsettling nature on the three United States Attorneys in Oklahoma and upon the District Attorneys of 40 counties within the State as to the jurisdiction to prosecute Indians for crimes in Indian Country. (While Respondents' counsel are also of Native American blood and are sensitive to the preference for the term "Native American" they use the term "American Indian" or "Indian" herein, as the appellation is so well engrained in the jurisprudence.)

The statement is illusory and untrue. The United States Attorneys in all portions of Oklahoma regularly prosecute Indians for crimes committed in Indian Country.

Respondents believe that only the Petitioner and the former District Attorneys of the Ottawa and Delaware Counties District believe there to be any question as to criminal jurisdiction in Indian Country. These District Attorneys are parties to civil actions brought by Tribes in the United States District Court for the Northern District of Oklahoma. They are presently enjoined from attempting to execute state process or commence criminal actions in the affected Indian Country by that Court. *Indian Country USA, Inc. v. Oklahoma Tax Commission*, 829 F.2d 967, 970 (10th Cir. 1987), Cert. den. *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, June 27, 1988, No. 88-1068. That case, wherein Petitioner was enjoined, resolves the issues propounded by both Petitioner and *amicus*. The Ottawa-Delaware County District Attorney is enjoined in #85-C-639 B (unreported) in the Northern District of Oklahoma, appeal docketed, #86-1885 (10th Cir., June 6, 1986.)

Both Petitioner and *amicus* refer to civil and criminal jurisdiction in Indian Country in their filings here. No civil law questions are involved. This case is an appeal from a motion holding that the State does not have jurisdiction to prosecute criminal violations of its tax acts allegedly committed in Indian Country by Indians. This case is a criminal procedure case.

ARGUMENT

Petitioner and *amicus* seek a Writ of Certiorari and review of the decision below to change long established and well settled law dispositive of this case. They assert criminal jurisdiction for the State without compliance with P. L. 83-280, 25 U. S. C. §§ 1321, et seq., by judicial fiat. They ask this Honorable Court to declare that Indians of different tribes than the owners of Indian Country are prosecutable in State Courts, despite the clear Congressional mandates. Petitioner and *amicus* seek reinstatement of *Ex Parte Nowabbi*, 61 P.2d 1139 (Okl. Cr. 1936). *Nowabbi* was overruled or superseded by later amendment of the definition of Indian Country. *Nowabbi* has been ignored by the Oklahoma Courts and the United States District Courts and Court of Appeals for the Tenth Circuit.

THE STATE OF OKLAHOMA HAS NO JURISDICTION OF CRIMES COMMITTED BY AN INDIAN IN INDIAN COUNTRY

The Respondents' smokeshop, the *locus in quo*, was located on lands leased from fee owners who are Muscogee (Creek) Indians. The respondents are Delaware Indians. (Appendix A, page 4a, Petition).

The Congress has clearly defined the Indian Country over which it retains exclusive jurisdiction as:

> " . . . (c) All Indian allotments, the Indian titles to which have not been extinguished. . . ." 18 U. S. C. § 1151.

The United States, by the Constitution, has supreme and exclusive jurisdiction over all matters involving the American Indian. *United States Constitution,* Article I Section 8, clause 3, Article II Section 2, clause 2 and Article VI clause 2. *Worcester v. Georgia,* 31 U. S. 515 (1832); *Menominee Tribe v. United States,* 391 U. S. 404 (1968); *Antoine v. Washington,* 420 U. S. 194 (1974); *Montana v. Blackfeet Tribe of Indians,* 471 U. S. 759 (1985); *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma,* 618 F.2d 665 (10th Cir. 1980), *Indian Country USA, supra.*

The Court of Criminal Appeals below previously announced the rule that Indians are not subject to State Court prosecution for crimes committed in Indian Country. *State v. Littlechief,* 573 P. 2d 263 (Okl. Cr. 1978); *C. M. G. v. State,* 594 P. 2d 798 (Okl. Cr. 1979); *State v. Burnett,* 671 P. 2d 1165 (Okl. Cr. 1983); *United States v. Burnett,* 777 F. 2d 593 (10th Cir. 1985) (The same case in Federal Court); *Cheyenne-Arapaho* and *Indian Country, USA,* both *supra.* The Court follows its rule here.

Quoting from *Burnett,* the following is most instructive:

> "The issue in this Rule VI appeal is whether restricted Osage allotment land is Indian Country under federal law. We find that it is; and affirm the magistrate's order dismissing state murder charges arising out of a slaying on such land." Id., at page 1136.
>
> [P. L. 83-280] . . . "passed in 1968, grants to the States consent to assume, with the consent of the Indians involved, jurisdiction to prosecute crimes committed in Indian Country . . .
>
> "However, the State's assertion that the alleged exercise of jurisdiction by individual law enforcement

> officers and court officials constitutes a binding election is unpersuasive. The states must 'manifest by political action their willingness and ability to discharge their new responsibilities' in order to make effective the assumption of jurisdiction. . . ."

– Id., at page 1167.[1]

The Attorney-General of Oklahoma is in accord. Opinion 87-176. 10 *Opinions of the Attorney General* 464.

Petitioner and *amicus* seek certiorari to revive *Ex Parte Nowabbi, supra.* They assert that *Nowabbi* should be followed as the Court below did not mention it in its opinions in *Littlechief, C. M. G.,* or *Burnett.* They argue that it has been revived because the Court below overruled the case in its original opinion, but did not mention it in its opinion on rehearing. *Nowabbi* is contra to all the cited cases.

Nowabbi was decided in 1936, prior to the dispositive amendment of the Federal Criminal Code adding the third category of Indian Country. See Cohen, *Handbook of Federal Indian Law,* (1982 Rev.) pages 777 through 789, and accompanying notes. Cohen's authoritative *Handbook* was originally published in 1942 prior to that amendment. It was revised and republished in 1982. The latter edition leaves no doubt that *Nowabbi* is not the law. Petitioner and *amicus* cite the original 1942 edition of Cohen as authority. The revised edition, cited by Respondents, the Oklahoma Supreme Court and the 10th Circuit correctly states the law. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma,* 711 P. 2d 77 (Okl. 1985) and *Indian Country,*

---

[1] An extensive quotation from *Burnett* showing the Court of Criminal Appeals reasoning and that it followed the law to the letter is in Appendix A.

USA, supra. The demise of *Nowabbi* is found in footnote 17 referring to footnote 16 of *Seneca-Cayuga,* Id., 81, 82.[2] *Nowabbi* simply is no longer the law.

Petitioner and *amicus* argue that the court below erred in not holding that Delaware Indians in Creek Indian Country are prosecutable in State Court. This argument is not the law, nor does it reflect error below. The decision below is amply supported by case law. Oklahoma has not complied with PL 83-280.

Petitioner argues that Oklahoma's Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 367, granted the State complete jurisdiction over Indian Country. This argument has been litigated before and resolved adversely to Petitioner. See *Indian Country, USA, supra* at pages 979 and 980.

The Court of Appeals for the Tenth Circuit held:

> "The language of the Oklahoma Act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally owned land base – events that never occurred and goals that Congress later expressly repudiated. . . ." *Indian Country, USA, supra,* at page 979.

This Honorable Court denied Certiorari in that case leaving the decision against Petitioner standing in *Indian*

---

[2] The text of the footnotes are in Appendix B. Respondents note the correctness of the Court's holding concerning *Nowabbi.* The decision on jurisdiction is not the law, and is not binding on the Court of Criminal Appeals.

Country, USA. The law is clear and has been decided in the Court of Appeals.

CONCLUSION

The Oklahoma Court of Criminal Appeals decided this case correctly by any reasonable standard of legal philosophy. The decision is amply supported by the Court's own prior decisions, by the decisions of the United States District Courts in Oklahoma and by the Courts of Appeals for the Tenth and District of Columbia Circuits. The decision is consonant with the controlling Acts of Congress. Petitioner and *Amicus* seek review by Certiorari to overturn long established settled law. Certiorari should be denied.

Respectfully submitted,

/s/ James R. Winnie
JAMES R. WINNIE, ESQ.*
Oklahoma City, Oklahoma
and
LESLIE R. REYNOLDS, ESQ.
Bartlesville, Oklahoma,

Attorneys for Respondents

* Counsel of Record

APPENDIX A

State v. Burnett, 671 P. 2d 1165, 1166, 1167, 1168 (Okl. Cr. 1983):

"The issue on this Rule VI appeal is whether restricted Osage allotment land is Indian Country under federal law. We find that it is; and affirm the magistrate's order dismissing state murder charges arising out of a slaying on such land." (Id., at page 1166.)

" 'Indian Country' for our purposes, means 'all Indian allotments, the Indian titles to which have not been extinguished' . . . " (Citing 18 U.S.C. Section 1151 (c) and cases). (Id., at page 1166.)

"Federal law permits states such as Oklahoma to assume jurisdiction over Indian lands. However, affirmative action is required to effectuate the assumption of jurisdiction.

Title 25 U.S.C. §1321 ¶ (a), (1970) passed in 1968, grants to the states consent to assume, with the consent of the Indians involved, jurisdiction to prosecute crimes committed in Indian Country, and 25 U.S.C. §1323 (1970), gives the consent of the United States to states to amend their constitutions or existing statutes to remove any legal impediments to the state assuming that jurisdiction. To date, the State of Oklahoma had made no attempt to repeal Art. I, §3, of the Constitution of the State of Oklahoma, which prohibits state jurisdiction over Indian Country, so the federal government still has exclusive jurisdiction over Indian Country located within Oklahoma boundaries. See *State v. Littlechief*, Okl. Cr., 573 P.2d 263 (1978).

"*C.M.G. v. State*, 594 P.2d at 799. A state constitutional amendment may not be necessary under subsequent federal case law. *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 493, 99

S.Ct. 740, 757, 53 L.Ed. 2d 740 (1979). However, the State's assertion that the alleged exercise of jurisdiction by individual law enforcement officers and court officials constitutes a binding election is unpersuasive. The states must "manifes(t) by political action their willingness and ability to discharge their new responsibilities' " in order to make effective the assumption of jurisdiction. Id., at 486, 99 S.Ct. at 754, Note 30, quoting from *Kennerly v. District Court of Montana,* 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971). An assumption of jurisdiction over the Indian Country could involve considerable burdens. *Williams v. Lee,* 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959), and thus far, no one with the right and power to speak for and bind Oklahoma has done so." (Id., at pages 1167 and 1168.)

The Court concluded:

"The land in question is 'Indian Country' within the meaning of 18 U.S.C. §1151 (c) (1976), and outside the jurisdiction of the District Court . . . " (Id., at page 1168.)

APPENDIX B

State ex rel May v. Seneca-Cayuga Tribe of Oklahoma, 711 P. 2d 77, 81, 82 (Okl. 1985):

To the extent that extant Oklahoma case law may be construed to reach a contrary conclusion, it is hereby disapproved and withdrawn.[17]

---

[17] *Ex parte Nowabbi, supra* note 16 at 1153 through 1156; Oklahoma Attorney's General Opinion No. 79-216, *supra* note 16. *Ex parte Nowabbi, supra* note 16, holding that Oklahoma could take jurisdiction over crimes committed by Indians in Indian Country, on which the Attorney's General Opinion relies, is based on pre-1948 law. The 1948 revised United States Code includes revisions found at 18 U.S.C. § 1151 (defining Indian Country) and § 1153 (The Major Crimes Act vesting jurisdiction in the United States for major crimes, e.g., murder, discussed in *Nowabbi, supra* note 16). Since enactment of the 1948 code, courts have been reluctant to exclude the lands of eastern Oklahoma tribes from application of federal law. See, e.g., *United States v. John*, 437 U.S. 634, 648 through 652, 98 S.Ct. 2541, 2548 through 2550, 57 L.Ed.2d 489 [1978] (federal law under the Major Crimes Act applied to Choctaws in Mississippi). For a thoughtful analysis of the *Nowabbi* decision and reasons to exclude it as a basis of state jurisdiction, see Cohen, *supra* note 16 at 777 through 780 and accompanying notes.

[16] Because the State argues that *all* tribes in Indian Territory were disestablished by a series of events culminating in Oklahoma statehood, citing as authority *Ex parte Nowabbi*, 60 Okl.Cr., 111, 61 P.2d 1139 [1936] and Oklahoma Attorney's General Opinion No. 79-216 [December 31, 1979], we note briefly the history of the Five Civilized Tribes in comparison with the tribes of the Quapaw Indian Agency. Most of the historical references derive from the excellent sketches in *Harjo v. Kleppe*, 420 F.Supp. 1110 [D.C. 1976], *aff'd. sub nom, Harjo v. Andrus*, 581 F.2d 949 [D.C.Cir.1978] (hereinafter referred to as

(Continued on following page)

(Continued from previous page)

Harjo v. Kleppe), and in F. Cohen, Handbook of Federal indian Law, 770 through 784 [1982 ed.]. The Five Civilized Tribes (Creek, Cherokee, Seminole, Choctaw and Chickasaw) came to Oklahoma following the Indian Removal Act of 1830. *Harjo v. Kleppe, supra* at 1119. Before the Civil War, these tribes owned most of the present-day Oklahoma, but because of their alliance with the Confederacy, were penalized by forced cession of their western lands to the federal government. Their remaining lands came to be known as "Indian Territory". *Harjo v. Kleppe, supra.*

Increasing white settlement had created a demand for allotment of Indian lands, resulting in passage of the "Indian General Allotment Act" (also known as "The Dawes Act" or the "Dawes Severalty Act"). Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 et seq. [1982]). The purpose of the Act was to distribute tribal lands to reservation Indians for eventual resale to white settlers. Although individual allottees were subject to state or territorial laws (both civil and criminal), after the issuance of trust patents the Act was amended in 1906 to postpone such jurisdiction until the trust period expired and fee simple patents were issued. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 [1982]). See *Ahboah v. Housing Authority of the Kiowa Tribe,* Okl., 660 P.2d 625, 628 [1983]. The Act exempted the lands of the Five Civilized Tribes, but the tribes of the Quapaw Indian Agency came within the terms of the Act and their lands were allotted at that time or shortly thereafter. *Harjo v. Kleppe, supra* at 1121 through 1122. (Note that the Quapaw Tribe, which had resisted the allotment policy, by tribal action allotted their own lands in 1893 and received congressional approval in 1895). See footnote 11 *supra.*

With the creation of Oklahoma Territory in 1890 (Organic Act), the Five Civilized Tribes and the tribes of the Quapaw Agency were exempted as the unorganized Indian Territory under concurrent federal and tribal jurisdiction. Act of May 2, 1890,

(Continued on following page)

(Continued from previous page)

ch. 182, § 1, 26 Stat. 81. Because of frequent disputes between the Indian tribes and white settlers (who were rapidly growing in number), in 1895 Indian Territory was divided into three judicial districts, with federal jurisdiction (both civil and criminal) over United States citizens, and in mixed cases over tribal citizens. These federal courts were to apply Arkansas law in the absence of federal statute. *Harjo v. Kleppe, supra* at 1121.

With the Appropriations Act of June 7, 1897, ch. 3, 30 Stat. 62, federal law was extended to include Indians in Indian Territory, although tribal legislation was still recognized subject to Presidential approval or veto. Mention of the tribes of the Quapaw Indian Agency is omitted from the Appropriations Act. *Harjo v. Kleppe, supra* at 1121. Major legislation following the Appropriations Act of 1897 also omitted the tribes of the Quapaw Agency and dealt specifically with the Five Civilized Tribes. Organic Act of May 2, 1890, *supra* (creation of Oklahoma Territory); Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267 (providing for Oklahoma statehood).

The Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495 (providing for forced allotments of lands held by the Five Civilized Tribes and termination of tribal status), finally rendered tribal law unenforceable in federal court, and the pre-existing tribal courts were abolished. Allotments for the Five Civilized Tribes were then completed by a series of congressional enactments. *Harjo v. Kleppe, supra* at 1121 through 1122.